WAN BAKRI WAN AHMAD A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
MOHAMED APANDI ALI JCA
AZAHAR MOHAMED JCA
[CRIMINAL APPEAL NO: T-05-24-2007]
20 JULY 2012 C

CRIMINAL PROCEDURE: *Charge - Alternative charges - Accused charged on principal charge of trafficking and alternative charge of possession - Accused convicted on principal charge - Whether judge ought to have recognised alternative charge - Whether judge left in doubt as to degree of seriousness of offence - Whether judge made affirmative finding of drugs which attracted presumption of trafficking - Dangerous Drugs Act 1952, s. 37(da)* D

CRIMINAL PROCEDURE: *Sentence - Imprisonment - Commencement of - Whether term of imprisonment to commence from date of arrest or date of sentence - Whether accused deprived of liberty since date of arrest - Whether period of remand to be taken into account in imposition of term of imprisonment* E

EVIDENCE: *Information leading to fact discovered - Information given by accused - Whether given voluntarily - Whether information admissible - Evidence Act 1950, s. 27* F

Based on information on drug trafficking activities, Chief Inspector Ahmad Rahim ('SP7') and his men proceeded to the house where G
the appellant/accused lived and subsequently arrested the accused. The accused, in response to SP7's questions on drug trafficking activities by the accused, led SP7 to the discovery of cannabis which were the subject matter of the three charges preferred against the accused. The accused was convicted and sentenced on H
the following charges: (i) principal charge of trafficking in 402.03 grams of cannabis ('principal charge 1'); (ii) alternative to charge 1 of possession of 402.03 grams of cannabis; (iii) possession of 77.35 grams of cannabis ('charge 2'); and (iv) possession of 30.99 grams of cannabis ('charge 3'). The accused was found guilty of I
the principal charge 1 and was convicted and sentenced to death.

For charges 2 and 3, the accused was found guilty, convicted and sentenced to 14 years imprisonment and three years imprisonment respectively, with both sentences to commence from the date of sentence. In the instant appeal, the grounds of appeal presented by the accused were, *inter alia*: (i) that the learned trial judge misdirected himself when he failed to recognise that with the prosecution's stance in preferring an alternative charge of possession, he should not have convicted the accused on the offence of trafficking; (ii) that the learned trial judge had erred in admitting the information under s. 27 of the Evidence Act 1950; and (iii) that the trial judge had erred in ordering the term of imprisonment to commence from the date of sentence and not from the date of arrest.

Held (dismissing appeal and affirming conviction and sentence by High Court on principal charge 1; allowing appeal for charges 2 and 3 to commence from date of arrest):
Per Low Hop Bing JCA delivering the judgment of the court:

(1) The accused was in affirmative possession of the 402.03 grams of cannabis which attracted the application of the presumption of trafficking under s. 37(da) of the Dangerous Drugs Act 1952. (para 7)

(2) The principles in the cases of *PP v. Ang Soon Huat* and *Leong Bon Huat v. PP* is only applicable if and only if the court is, on the evidence, left in doubt as to whether the accused had committed an offence in a lower or higher degree of seriousness. In the instant appeal, based on the evidence adduced at the trial, the learned trial judge was not left in doubt as to the possession of 402.03 grams of cannabis, which consequently triggered off the presumption of trafficking under s. 37(da) of the DDA. In the circumstances, there was no legal requirement for the learned judge to make a finding on the alternative charge 1. (paras 8 & 9)

(3) The learned trial judge had embarked on a maximum evaluation of the evidence of SP7. There was not an iota of evidence to suggest that the accused had given his information involuntarily. There was also no suggestion of any force used by SP7 on the accused. Hence, the learned judge's finding was based exclusively on his observation of the demeanour and credibility of SP7 and there was no error in his application of s. 27 to his specific finding of facts. (para 13)

(4) The accused had been in remand since the date of his arrest and thus he had been deprived of his liberty since that date. The imposition of the terms of sentences from the date of sentence would mean that the period of remand had been disregarded and that would run counter to fairness and the interest of justice. The sentences should therefore commence from the date of arrest. In the circumstances, the sentence of 14 years imprisonment on charge 2 was ordered to run from the date of his arrest, while the sentence of imprisonment on charge 3 should commence thereafter. (paras 16 & 18)

Bahasa Malaysia *Translation Of Headnotes*

Berdasarkan maklumat mengenai aktiviti pengedaran dadah, Cif Inspektor Ahmad Rahim ('SP7') dan pasukannya menuju ke rumah perayu/tertuduh dan kemudian menangkap tertuduh. Tertuduh, sebagai balasan kepada pertanyaan SP7 mengenai aktiviti pengedaran dadah oleh tertuduh, membawa SP7 kepada penemuan kanabis yang merupakan subjek perkara tiga pertuduhan ke atas tertuduh. Tertuduh disabitkan dan dihukum atas pertuduhan-pertuduhan berikut: (i) pertuduhan utama pengedaran 402.03 gram kanabis ('pertuduhan utama 1'); (ii) alternatif kepada pertuduhan 1 iaitu milikan 402.03 gram kanabis; (iii) milikan 77.35 gram kanabis ('pertuduhan 3'); dan (iv) milikan 30.99 gram kanabis ('pertuduhan 3'). Tertuduh didapati bersalah atas pertuduhan utama 1 dan disabitkan dan dihukum mati. Bagi pertuduhan 2 dan 3, tertuduh didapati bersalah, disabitkan dan dihukum, masing-masing kepada 14 tahun penjara dan tiga tahun penjara, dengan kedua-dua tempoh pemenjaraan bermula dari tarikh hukuman. Di dalam rayuan ini, alasan rayuan yang dikemukakan oleh tertuduh adalah, antara lain: (i) bahawa yang arif hakim bicara telah tersalah arah dirinya apabila beliau gagal memberi perhatian bahawa dengan pendirian pihak pendakwaan dalam mengemukakan pertuduhan alternatif milikan, beliau tidak patut mensabitkan tertuduh atas kesalahan pengedaran; (ii) bahawa yang arif hakim bicara khilaf di dalam menerima maklumat di bawah s. 27 Akta Keterangan 1950; dan (iii) bahawa hakim bicara khilaf di dalam membuat perintah tempoh pemenjaraan bermula dari tarikh penghukuman dan bukan dari tarikh tangkapan.

Diputuskan (menolak rayuan dan mengesahkan sabitan dan hukuman oleh Mahkamah Tinggi atas pertuduhan utama 1; membenarkan rayuan bagi pertuduhan 2 dan 3 bermula dari tarikh tangkapan)

Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Tertuduh secara afirmatif mempunyai milikan 402.03 gram kanabis yang menarik pemakaian anggapan pengedaran di bawah s. 37(da) Akta Dadah Berbahaya 1952 ('ADB').

(2) Prinsip di dalam kes-kes *PP v. Ang Soon Huat* dan *Leong Bon Huat v. PP* hanya terpakai jika dan semata-mata jika mahkamah, atas keterangan, masih meragui sama ada tertuduh telah melakukan suatu kesalahan pada tahap yang kurang atau lebih serius. Di dalam rayuan ini, berdasarkan kepada keterangan yang dikemukakan semasa perbicaraan, yang arif hakim bicara tidak mempunyai keraguan mengenai milikan 402.03 gram kanabis, yang dengan itu mencetuskan anggapan pengedaran di bawah s. 37(da) ADB. Dalam keadaan tersebut, tidak ada keperluan dari segi undang-undang bagi yang arif hakim membuat penemuan atas pertuduhan alternatif 1.

(3) Yang arif hakim bicara telah memulakan penilaian maksimum atas keterangan SP7. Tidak ada sedikitpun keterangan yang menyarankan bahawa tertuduh telah memberikan keterangan secara tidak sukarela. Juga tidak ada saranan bahawa apa-apa paksaan telah digunakan oleh SP7 ke atas tertuduh. Dengan itu, penemuan yang arif hakim adalah berdasarkan secara eksklusif atas pemerhatiannya terhadap tingkah laku dan kebolehpercayaan SP7 dan tidak ada kekhilafan di dalam pemakaian s. 27 terhadap dapatan fakta spesifik oleh beliau.

(4) Tertuduh berada dalam tahanan semenjak tarikh tangkapannya dan oleh itu kebebasannya telah dirampas semenjak tarikh itu. Pengenaan tempoh hukuman dari tarikh penghukuman akan bermaksud bahawa tempoh tahanan tidak diambil kira dan ia adalah bertentangan dengan keadilan dan kepentingan keadilan. Oleh itu, hukuman sewajarnya bermula dari tarikh tangkapan. Dalam keadaan tersebut, hukuman 14 tahun penjara bagi pertuduhan 2 diperintahkan berjalan dari tarikh tangkapan, sementara hukuman penjara bagi pertuduhan 3 bermula selepas itu.

Case(s) referred to:
Francis Anthonysamy v. PP [2005] 2 CLJ 481 FC ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***
Leong Bon Huat v. PP [1993] 3 CLJ 603 SC ***(dist)***
PP v. Ang Soon Huat [1990] 1 LNS 103 HC ***(dist)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 37(da)
Evidence Act 1950, s. 27

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Najib Zakaria; DPP

[Appeal from High Court, Kuala Terengganu; Criminal Trial No: 45-09-2003]

Reported by S Barathi

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] This appeal by the appellant (the accused) concerns the decision of the Kuala Terengganu High Court on the following charges:

Charge	Offence	Decision
Principal Charge 1	Trafficking in 402.03 gm of cannabis	The Accused was found guilty, convicted and sentenced to death
Alternative to Charge 1	Possession of 402.03 gm of cannabis	–
Charge 2	Possession of 77.35 gm of cannabis	The Accused was found guilty, convicted and sentenced to 14 years imprisonment from the date of sentence
Charge 3	Possession of 30.99 gm of cannabis	The Accused was found guilty, convicted and sentenced to three years imprisonment from the date of sentence

A **Finding Of Facts**

[2] In essence, the learned trial judge's finding of facts may be summarised as follows:

B (i) The evidence adduced for the prosecution unfolded that on 10 July 2003, Chief Inspector Ahmad Rahim bin Mohamed (SP7), acting on information on drug trafficking activities, gathered his men and proceeded to a house known as No. 3413, Kg Mengabang Tengah, Batu Buruk, Kuala Terengganu. When SP7 reached the house, he asked one C Zabidah bte Mahmood (SP3), the accused's first wife, whether the accused lived there. SP3 told SP7 that the accused was not at home. SP7 and his men remained in the house. At about 7.50pm, SP7 saw a Kancil car bearing registration No. TAB 2304 driven by the accused together with a boy and the D accused's daughter (SP4). When the accused arrived at the house, SP7 arrested him and asked him about his drug trafficking activities. The accused responded by leading SP7 to the discovery of a cigarette box containing cannabis in the Kancil car. The cannabis was later confirmed to weigh 77.35g E which is the subject matter of charge 2.

(ii) The accused then led SP7 and his team to another house at No. 763C, Kg Kubang Bakong and arrived there at about 8.40pm. One Zuraida binti Mamat (SP5), the accused's second F wife, was in the house. SP7 entered the house and asked SP5 to sit in the living hall. The accused was brought to the back room where the accused pointed to SP7 a plastic container on the floor. In that plastic container, there were four compressed slabs which were later confirmed to contain G 402.03g of cannabis which is the subject matter of the principal trafficking charge 1.

(iii) From the Bakong house, the accused led SP7 and his team to another house at No. 88, Ladang Primula Hotel, Kuala H Terengganu. SP7, his team and the accused reached the house at about 9.20pm. In front of the house, SP7 saw a Proton Wira No. TT2312. The car was locked. The accused used the keys, which he took out from his pocket, to open the car and took out from its dashboard a plastic bag in which I was a cigarette box containing substances which were later confirmed to be 30.99g of cannabis, the subject matter of charge 3.

(iv) The accused's defence was essentially that he had no knowledge whatsoever of the presence of the cannabis in the car and in the houses. He denied having given the information leading to the discovery of the cannabis.

Alternative Charge For Possession

[3] Learned counsel Mr Hisyam Teh Poh Teik's first ground of appeal is that the learned trial judge had misdirected himself when he failed to recognise that with the prosecution's stance in preferring an alternative charge of possession, he should not have convicted the accused on the offence of trafficking. Support was sought in *PP v. Ang Soon Huat* [1990] 1 LNS 103 HC Singapore and *Leong Bon Huat v. PP* [1993] 3 CLJ 603 SC.

[4] Learned deputy public prosecutor Mr Najib Zakaria responded that the learned trial judge had correctly convicted the accused on principal charge 1 and so there was no necessity to consider the alternative to charge 1.

[5] We shall now proceed to consider the two authorities relied on by the accused. In *Ang Soon Huat, supra*, Chan Sek Keong J (now CJ Singapore) and Chua J, stated in the concluding paragraph of their grounds of judgment that "the principle that where the court is, on the evidence, left in doubt as to whether the accused had committed an offence in a lower or a higher degree of seriousness, the court should make a finding in the lower degree, particularly in a case in which a finding in a higher degree will give rise to a mandatory sentence of death."

[6] *Ang Soon Huat, supra*, was followed in *Leong Bon Huat, supra*.

[7] Our perusal of the appeal record herein revealed that the accused was in affirmative possession of the 402.03g of cannabis. This fact attracts the application of the trafficking presumption under s. 37(da) of the Dangerous Drugs Act 1952, which the learned trial judge had correctly invoked. (A reference hereinafter to a section is a reference to that section in the Dangerous Drugs Act 1952).

[8] It is clear to us that the learned trial judge was not in doubt that the prosecution had proved possession and has thereby invoked the presumption under s. 37(da). That being the case, there was no legal requirement for the learned judge to make a finding on the alternative to charge 1.

[9] We are of the view that the principle stated in *Ang Soon Huat, supra*, and *Leong Bon Huat, supra*, is applicable if and only if the court is, on the evidence, left in doubt as to whether the accused had committed an offence in a lower or higher degree of seriousness. In the instant appeal, we find that, on the evidence adduced at the trial, the learned trial judge was not left in doubt as to the possession of 402.03g of cannabis which consequently triggered off the presumption under s. 37(da). In the circumstances, with the utmost respect, we hold that the aforesaid two authorities are readily distinguishable and hence unhelpful to the accused.

Section 27 Information

[10] The next ground of appeal is that the learned trial judge had erred in admitting the information under s. 27 of the Evidence Act 1950. The prosecution disagreed.

[11] We note that no issue was raised in relation to the involuntariness of the s. 27 statement or information given by the accused to SP7.

[12] An illuminating judgment on the scope of s. 27 was delivered by the Federal Court through Augustine Paul FCJ (as he then was) in *Francis Anthonysamy v. PP* [2005] 2 CLJ 481 FC. The principles may be stated as follows:

(i) *Goi Ching Ang v. PP* [1999] 1 CLJ 829, cannot be understood to mean that a s. 27 statement must be excluded in all instances where it was supplied involuntarily. That case did not profess to lay down such a rule. The facts of each case are important. The *ratio* that can be gleaned from *Goi Ching Ang, supra*, is that a court, in considering the exclusion of a s. 27 statement on the ground of involuntariness, must take into account the facts of the case and the degree of force used.

(ii) The degree of involuntariness that can be said to be sufficient to exclude a s. 27 statement in the exercise of the discretion of the court must be balanced against the fact that involuntariness is not a condition of admissibility of such a statement.

(iii) The circumstances of involuntariness must indeed be extraordinary in order to exclude a statement on a ground which, in the first place, does not affect its admissibility in law.

[13] In the instant appeal, the learned trial judge had embarked on a maximum evaluation of the evidence of SP7. There was not an iota of evidence to suggest that the accused had given his information involuntarily. There was also no suggestion of any force used by SP7 on the accused. We are of the view that the learned judge's finding is based exclusively on his observation of the demeanour and credibility of SP7. We find no error in his application of s. 27 to his specific finding of facts.

Sentence From Date Of Arrest

[14] The third and final ground of appeal is that the learned trial judge had erred in ordering the term of imprisonment to commence from the date of sentence, as it ought to run from the date of arrest.

[15] The prosecution supported the date of commencement of the sentences of imprisonment from the date of the sentences as ordered by the learned trial judge.

[16] On the issue of the commencement date of the terms of imprisonment, it is pertinent for us to point out that the accused had been remanded since the date of his arrest. Hence, the accused has been deprived of his liberty from that date. The imposition of the terms of sentences from the date of sentence would mean that the period of his remand had been disregarded. That would run counter to fairness and the interest of justice. The sentences should therefore commence from the date when he lost his liberty ie, when he was first remanded.

Conclusion

[17] On the foregoing grounds, we dismiss this appeal and affirm the decision of the High Court relating to the conviction and sentence on principal charge 1.

[18] On the commencement date for the terms of imprisonment, we agree with the defence contention that the imprisonment terms should commence from the date of arrest. We therefore allow this part of the appeal and order the sentence of 14 years imprisonment on charge 2 to commence from the date of his arrest, while the sentence of imprisonment on charge 3 shall commence thereafter.